IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.572 OF 1991.

1. Savji Mhadu Kelaskar
   Since deceased through his
   heir and legal representative

1A. Shri Dattatraya Sitaram Kelaskar,
   res. at Ram tekdi,
   Behind Swan Mills,
   Shivadi, Bombay.

2. Govind Mhadu Kelaskar,
   since deceased by his heir
   and legal representative

2A. Jayram Govind Kelaskar,
   res. at Shree Marleshwar Society,
   Nutan Nagar Chandawarkar Road,
   Borivali(West), Bombay 92

..Appellants
(Original Defendants.1&2)

versus

1. Smt. Savitri Gangaram Kelaskar

2. Krishna Gangaram Kelaskar,
   both residents of Venzole,
   Taluka : Sangameshwar,
   District : Ratnagiri.

3. Dhaktu Gangaram Kelaskar,
   residing at Shroff Wadi,"B"
   Gallo, Room No.143,
   Senapati Bapat Marg,
   Bombay 400 013.

4. Smt. Thaki Hari Bendagale,
since deceased through her heir
and legal representative
a) Shri Vishnu H. Bendagale,
res. at Sanskruti Bldg. No.21,
Flat No.702, Asha Nagar,
Near Thakur Complex,
Kandivli(East), Mumbai 101

b) Smt. Saraswati Shridhar Nate,
Shree Marleshwar Hsg. Soc.,
22/B, Nutan Nagar,
Chandawarkar Road,
Borivli (West),
Mumbai 400 092.

5. Smt. Baya Dhondhya Dabholkar,
since deceased through legal heir
a) Sout Sarojini Gangadhar Chile,
Babanji's wadi, Golibar Road,
Near Sarvodaya Hospital,
Ghatkoper, Bombay 400 086. ..Respondents.

Mrs. S.S.Deshpande, Advocate for the Appellant.

Mr. S.N.Bhosale for Respondent Nos.1 and 3.

CORAM ; S.R.SATHE, J.

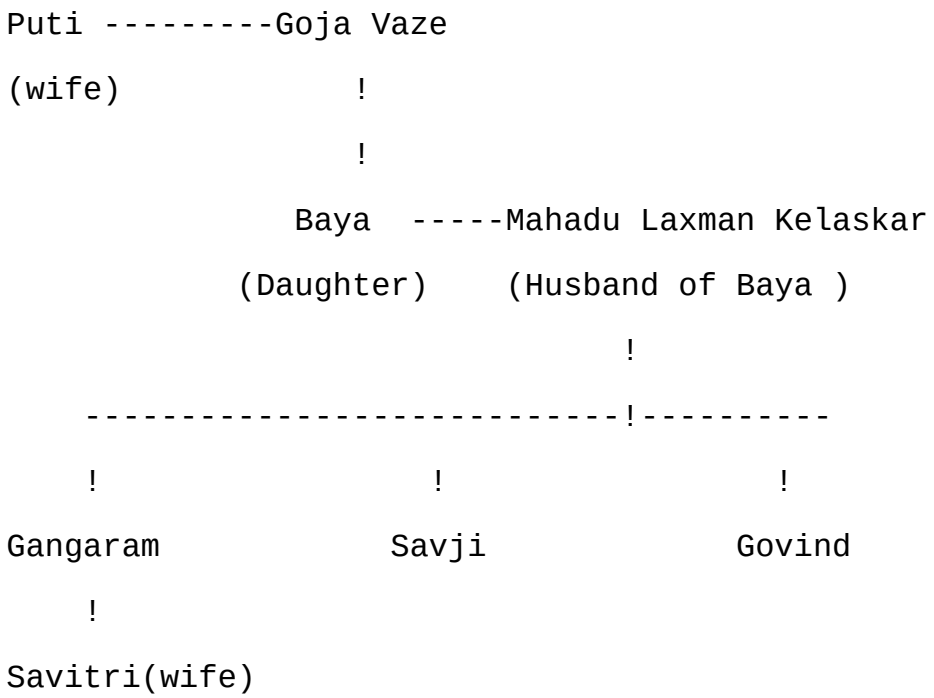
DATED : 1st September, 2004.

JUDGMENT :

1. Being aggrieved by the judgment and order passed by the Court of District Judge, Ratnagiri, in Civil Appeal No. 2 of 1985 whereby the order passed by the Court of Civil Judge Junior Division in Regular Civil Suit No.22 of 1981, declaring that the suit land at serial nos.1 to 3, 5 to 17 and the suit house are not liable for partition

was set aside and plaintiffs suit for partition was decreed, holding that the plaintiffs branch is having 7/24 share in the suit land, the original defendants Nos.1 and 2 have filed this second appeal.

2. In order to appreciate the facts giving rise to this appeal it would be worthwhile to set out here the pedigree showing the relations between the parties.



3. According to the plaintiffs, the plaintiffs and defendants constitute joint Hindu Family. Suit properties described in detail in para 1(a) and (b) of the plaint are the ancestral properties of the said joint family. The agricultural lands situated at village Vengole mentioned in para 1 of the plaint were originally owned by Goja Vaze. After his death the said lands were entered in the name of his widow by name Puti. They had only one daughter by name Baya i.e. wife of Mahadu Kelaskar. Mahadu was residing alongwith his father in law Goja. Even during the lifetime of Goja, Mahadu was cultivating the suit lands and as such the same were entered in his name as absolute owner. So far as lands described at serial nos.6, 8, 13, 14 and 16 of para 1 of the plaint are concerned, the same were tenanted lands and entered in the name of defendant no.1 as manager of joint family. However, after the death of Mahadu’s son Gangaram, the other two sons namely Savji (defendant no.1) and Govind (defendant no.2) started disturbing the possession of the plaintiff. Infact, they dispossessed the plaintiff no.1 from the suit

property. The dispute between the plaintiffs and defendants was therefore referred to the panchayat and the defendants agreed to give 1/3rd share in the suit property to plaintiffs and defendants 3 and 4. They, however did not give the partition and possession as agreed. Hence on 24.3.1981 the plaintiffs filed present suit for the partition and possession of their 1/3rd share in the suit property. According to the plaintiff the suit house was also ancestral property but under the guise of repairing the same the defendants 1 and 2 carried out major alterations and for that purpose they used the joint family funds. So, the plaintiffs also claimed 1/3rd share in the suit house.

4. The defendants 1 and 2 filed their joint written statement at exhibit 26 and resisted the suit claim. They admitted their relations with the plaintiffs, however, contended that deceased Goja Vaze was the owner of only two lands mentioned at serial nos.4 and 18 i.e. survey no.56/4 and survey no.103/4 and after his death name of his wife Puti was entered in the record of

rights and after the death of Puti name of Baya i.e. mother of defendants 1 and 2 was entered in the record of rights. Baya died in the year 1952-53, while her spouse Mahadu died in the year 1959-60. The defendants further contended that deceased Baya had three daughters and Baya's property devolved on them and as such plaintiffs and defendants have no right, title and interest in the suit property. According to them the suit property described at serial no.5, 6, 8, 13, 14, 15 and 16 in column 1(a) of the plaint were in possession of defendant no.1 as tenant and deceased Mahadu was not at all concerned with the said lands. Infact, defendant no.1 has paid the purchase price of the said lands and necessary certificate under section 32 M of B.T.& A.L.Act has been granted in his favour. They, therefore contended that plaintiffs have no right to ask for partition of the said lands. The defendants also contended that the suit property described at serial no.11 i.e. Survey No.63, Hissa No.2 , so also Survey no.63 Hissa No.4 and survey no.63 hissa no.6 are the self acquired properties of defendant no.1 and the same have been purchased by

him by virtue of sale deed dated 20.03.1948. The defendants also denied plaintiffs claim for partition and possession in respect of the house property. Hence on these grounds the defendants prayed for dismissal of the suit.

5. In view of the contentions raised by the defendants 1 and 2 the plaintiff amended the plaint and added three daughters of deceased Baya as defendant Nos.5 to 7 in the suit. They filed common written statement at exhibit 38 and contended that the property described at serial nos. 4 and 18 is owned by them and gave up their rights for defendant no.1 alone.

6. On these pleadings the learned trial court framed issues at exhibit 28. In order to prove the suit claim the plaintiff has examined herself at exhibit 52 and witness Laxmi Vaze exhibit 57. As against this defendants did not adduce any oral evidence but only produced documentary evidence, mainly in the form of 7/12 extract of mutation entries. After considering the oral and documentary evidence adduced by the parties the

trial court came to the conclusion that the plaintiffs and defendants 3 and 4 failed to prove that the properties except the property mentioned at serial Nos.4 and 18 are the ancestral properties and as such the plaintiffs are not entitled to get partition and separate possession of the said properties. The trial court therefore granted the partition and seperate possession of plaintiffs and defendants 3 and 4s 1/6th share in the suit lands mentioned at serial nos.4 and 18 and held that plaintiffs are not entitled for partition of the suit properties mentioned at serial nos.1 to 3 and 5 to 17.

7. Being aggrieved by the said order the original plaintiffs 1 and 2 filed civil appeal no.2 of 1985 in the district court, Ratnagiri. The appellate court however held that the plaintiffs have proved that the suit property are joint family properties of plaintiffs and defendants and that plaintiffs branch is having 7/24 shares in the suit property described in para 1(a) of the plaint i.e. agricultural land. He also held that the defendants 1, 2, 5, 6 and 7

will be entitled to 1/24 share in the suit land. The first appellate court held that defendants 5 to 7 are not having any share in the dwelling house. Accordingly the trial court decree was modified and appeal was allowed to that extent.

8. The original defendants 1 and 2 have challenged the above mentioned order passed by the first appellate court. At the time of admission on 28.1.1991 this court observed "Grounds 2 and 3 raise substantial question of law. The decree of the appellate court in so far as it disturbs the decree of the trial court deserves consideration. The decree of the trial court however is in order and deserves to be confirmed. Admit in so far as the appellate court disturbs the decree of the trial court." The grounds 2 and 3 are as under :

> (2) Whether the plaintiffs respondents could claim a share in the properties acquired by the appellants defendant, when there was no joint family and there was no nucleus and the properties were acquired independently by the appellants.

(3) Whether the lower appellate court was right in applying the presumption of the existence of a Hindu Joint family to the existence of joint family property and whether in the absence of any proof in respect of the joinders of the property the respondents were entitled to any share in respect of the same.

9. In this second appeal before me, Mrs. Deshpande, learned Advocate for the original defendants has urged two points. Firstly, she submitted that the first appellate court has wrongly held that all the suit properties are joint family properties of Mahadu and his sons. Secondly, she canvassed before me that the first appellate court ought to have held that most of the suit properties i.e. aforesaid properties mentioned at serial nos.4 and 18 were in fact self acquired properties of the defendant no.1 and as such the plaintiffs were in fact not entitled to get partition in respect of the said suit properties. As against this, the learned Advocate

for the Respondents supported the judgment and order passed by the first appellate court.

10. The relations between the parties to the present proceedings is not in dispute. From perusal of the plaint it appears that the plaintiffs have specifically come out with a case that the suit properties were initially owned by Goja Vaze and Mahadu Laxman Keluskar i.e. father of the present defendant nos.1 and 2 and his brother Gangaram who is son in law of Goja Vaze. During the lifetime of Goja Vaze, Mahadu was residing with him and after death of Goja Vaze the properties were entered in the name of Mahadu Laxman Keluskar and thus the suit properties are joint family properties of Mahadu and his sons viz. husband of plaintiff no.1., defendant no.1 Savaji and defendant no.2 Govind. As against this the defendant Nos.1 and 2 have specifically contended that all the suit properties were not at all owned by Goja Vaze or even by Mahadu Laxman. But on the contrary except the properties mentioned at serial no.4 and 18, rest of the properties are owned by the defendant no.1 and as

such plaintiffs and other defendants are not at all concerned with the same. So, it is in fact first necessary to find out whether all the properties mentioned in the plaint are joint family properties. It is true that every Hindu family is presumed to be joint unless it is shown that the partition has taken place between them. However at the same time the said presumption is not in respect of joint family properties, it restricts only with regard to the family and not property. When plaintiff filed a suit and alleged that certain properties are belonging to joint family, the initial burden rests on the plaintiff to prove that the properties in question are in fact joint family properties. For this purpose plaintiff has to show that the suit property was initially owned by the common ancestors or he has to show that the suit property has been purchased from the joint family fund or joint labour or by showing that the joint family possessed joint family property of such a nature that with its help the property in controversy could have been acquired. If the existence of joint family property nucleus is either asserted or proved then

it must be shown that said nucleus was of such nature that with the help of such nucleus either karta of the joint family or any other member of the joint family was in a position to acquire the other property. If this initial burden is discharged by the plaintiff then only the onus shifts on the defendants to prove that the property in question is his self acquired property and not the property purchased with the help of joint family funds or that with the help of nucleus. Bearing in mind this position of law, if we take into consideration the evidence on record it must be said that there is not even a single document on record which would go to show that all the suit properties were intially owned either by Goja Vaze or by Mahadu Laxman, father of present plaintiffs husband Gangaram and defendant nos.1 and 2. There is only on 7x12 extract in respect of Survey No.52/22 which shows that the name of the defendant no.1 was shown as the manager of the joint family. In all other 7x12 extracts of the suit land the name of the defendant no.1 only is appearing in holders column as well as in column of Kul and Khand. So far as the land bearing

Survey No. 56/14 and Survey No.103/4 are concerned, it appears that the name of Mahadu has been entered in respect of the said land by virtue of mutation entry no.553. In fact, from other record and in particular the extract of Akar and Phod it appears that these lands were initially owned by Goja Vaze. Naturally, the question will arise as to how these lands were entered in the name of Mahadu when admittedly Mahadu was not the son of Goja Vaze, but on the contrary he was the son in law of Goja Vaze. It is also admitted that Goja Vaze died much prior to 1956 leaving behind wife Puti and daughter Baya. So, as per law of inheritance, the then existing, property of deceased Goja Vaze should infact devolve to his wife Puti and in fact accordingly the name of Puti was entered in respect of the land. After the death of Puti , the property was inherited by Baya, for this also there is no dispute between the parties. It is the case of the plaintiffs that after the death of Goja Vaze or Baya, Mahadu whose name was entered in the record, became the owner of all the properties. I have mentioned above that question of all the properties in fact

does not arise because Goja Vaze was not the owner of the suit property except the property at serial nos.4 and 18. So after the death of Baya as per law of inheritance in respect of women then existing prior to 1956 the property should devolve in the following mode :

(Mulla’s Hindu Law 18th Edition paragraph 147)

1. Unmarried daughter,
2. Married daughter, who is not provided for
3. Married daughter who is provided
4. Daughter’s daughter
5. Daughter’s son
6. Son
7. Son’s son.

11. At this stage the learned advocate for the plaintiffs submitted that after the death of Baya the property would go to the heirs of Goja Vaze by way of reversionary succession. However, I do not agree with the submission. Admittedly, Baya died prior to 1952-53 , so what we have to see is succession of the female prior to coming into

operation of Hindu Succession Act. So as per law then existing as mentioned by me above, the property would devolve to the daughters of Baya. So, in fact defendant nos.5, 6 and 7 became the owner of the property which was initially owned and possessed by Goja Vaze. Ofcourse, the said defendants have submitted that they have given this property only in favour of the defendant no.1. But the fact remains that so far as the plaintiffs are concerned they are not entitled to have partition and possession in respect of even those two properties which were initially owned by Goja Vaze because according to him the said property had never become the joint family property of Mahadu and his sons.

12. So far as the other properties are concerned, there is not even a single mutation entry or 7 x 12 extract showing the name of Mahadu as owner of the said land. On the contrary, all 7 x 12 extracts would go to show that the said lands are owned and possessed by defendant no.1 Savaji. An attempt was made to show that the said Savaji was the manager of the Joint Hindu Family and

there was joint family income and he purchased the said property out of the said joint family funds or out of nucleus of the joint hindu family fund. It is true that the defendants have not stepped into the witness box and as a result of the same the first appellate court has held that adverse inference can be drawn against them. But we cannot ignore the fact that initial burden lies on the plaintiff to show that the joint family had specific income or that there was nucleus sufficient to purchase the property in question i.e. the properties which are standing in the name of Sayaji. I have already mentioned above that there is in fact no sufficient material on record to indicate that the joint family had sufficient income. The record shows that the name of Sayaji was entered as a manager of joint family only in respect of land bearing block no.52/22 which land is shown to be admeasuring 147 Ares and except grass there is nothing in the said land. So, under such circumstances, it is very difficult to believe that Sayaji had purchased all other further lands out of the income of the land bearing survey no.52/22. On the contrary, so far

as the lands bearing Survey nos.65, 64 and 61 are concerned, it appears that Savaji was in possession of the said lands as a tenant and he was cultivating the said lands. There is nothing on record to indicate that the plaintiffs were actually cultivating the said land or that they were helping the defendant no.1 in cultivation of the said lands or that they were meeting the expenses with regard to the cultivation of the said lands. The plaintiffs have produced at exhibit 50/1, 2, 3 and 4 the certificates issued under section 32 of B.T. and A.L. Act, which go to show that the said lands were owned and possessed by him and same were not joint family properties. So, under such circumstances, there was no need for the defendants nos. 1 and 2 to examine themselves. Merely because they did not adduce any oral evidence, no adverse inference can be drawn against them, particularly when we find that there is nothing on record to show that the plaintiffs had called upon them to offer themselves for cross examination and they had refused to do so. So I do not think that non-examination of defendant nos.1 and 2 is fatal

to their case.

13. At this stage the learned Advocate for the Respondent argued before me that as in the instant case the defendant had not stepped into the witness box, certified copies of the mutation entry as well as 7x12 extract produced by the defendant cannot be relied upon. For this proposition he has placed reliance on a case Vithal Ramrao Ingale (Patil) V/s. Navalbai Digambar Deshmukh, reported in 2003(1) ALL MR 650 and case of Vitthal Daulat Lad V/s. Ashok Govind Tawade, reported in 2002(2) ALL MR 691. From perusal of the above cited rulings it is very clear that the facts of the above mentioned cases and the facts of the case in hand are quite different. In the former cases, the documents were some ancient documents on which the reliance was placed without there being any evidence regarding contents of the same. The same is the position in respect of other case. Here in the instant case admittedly the documents on which the defendants had placed reliance were 7x12 extracts duly authenticated by the concerned Department and

no objection was taken by the other side for the said document. On the contrary the said documents were relied by both the parties and were accepted in evidence by the Court below. There was no objection for referring the said document or accepting it during the course of trial or during hearing of the first appeal. It is for the first time in the second appeal that objection is being raised that the said documents cannot be read in evidence because the defendants have not stepped into witness box and have proved the contents of those documents viz 7x12 extracts and mutation entry.

14. Under these circumstances, I think that there is no substance in the argument advanced by the learned advocate for the Respondent in this behalf. It is not at all necessary for the defendants to step into the witness box in order to prove the contents of those mutation entries or any other witness from revenue authority.

15. Thus, from the above discussion, it is very clear that first appellate court wrongly

assumed that entire suit property is joint family property of Mahadu Laxman and his sons and therefore observed that provisions of section 8 of Hindu Succession Act would be applicable and hence held that the plaintiffs are having 7/24 share in the property described in para 1 of the plaint and defendants 1, 2, 5, 6 and 7 are having share to the extent of 1/24th. The said finding is not correct for the reasons mentioned above. On the contrary, the finding recorded by the trial court to the effect that properties mentioned at Sr.No.1 to 3 and 5 to 17 are not joint family properties and not liable for partition is correct. The plaintiff's suit in respect of those properties was rightly dismissed.

16. Though the trial court has observed that the plaintiff is entitled for partition and separate possession in respect of property at serial nos.4 and 18, I have already mentioned that even those properties cannot be regarded as joint family properties of Mahadu and his sons. In this view of the matter it is necessary to interfere with the finding recorded by the first

appellate court and allow the appeal.

17. Hence the appeal is allowed. The judgment and order passed by the first appellate court is set aside. Plaintiffs suit for partition and separate possession is dismissed.

. Under the circumstance of the case parties to bear their own costs.

. Certified copy expedited.

(S.R.Sathe, J)